2010

S. Steven Maese v. Tooele County : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

S. STEVEN MAESE, Petitioner and Appellant, v. TOOELE COUNTY, Respondent and Appellee.	Case No. 20100357-CA

APPEAL FROM A MARCH 29, 2010 RULING AND ORDER GRANTING TOOELE COUNTY'S MOTION FOR SUMMARY JUDGMENT IN THE UTAH THIRD DISTRICT COURT, TOOELE COUNTY, BY THE HONORABLE STEPHEN L. HENRIOD

BRIEF OF APPELLEE TOOELE COUNTY

Kelly Ann Booth, Utah Bar No. 10910
kellyann@boothlegal.com
LAW OFFICES OF KELLY ANN BOOTH, PLLC
Attorneys for Appellant Maese
The Judge Building
8 East Broadway, Suite 700
Salt Lake City, Utah 84111
Telephone: (801) 364-6666
Facsimile: (801) 618-3835

Barton H. Kunz II, Utah Bar No. 8827
bart.kunz@chrisjen.com
CHRISTENSEN & JENSEN, P.C.
Attorneys for Appellee Tooele County
15 West South Temple, Suite 800
Salt Lake City, Utah 84101
Telephone: (801) 323-5000
Facsimile: (801) 355-3472

IN THE UTAH COURT OF APPEALS

S. STEVEN MAESE, Petitioner and Appellant, v. TOOELE COUNTY, Respondent and Appellee.	Case No. 20100357-CA

APPEAL FROM A MARCH 29, 2010 RULING AND ORDER GRANTING TOOELE COUNTY'S MOTION FOR SUMMARY JUDGMENT IN THE UTAH THIRD DISTRICT COURT, TOOELE COUNTY, BY THE HONORABLE STEPHEN L. HENRIOD

BRIEF OF APPELLEE TOOELE COUNTY

Kelly Ann Booth, Utah Bar No. 10910
kellyann@boothlegal.com
LAW OFFICES OF KELLY ANN BOOTH, PLLC
Attorneys for Appellant Maese
The Judge Building
8 East Broadway, Suite 700
Salt Lake City, Utah 84111
Telephone: (801) 364-6666
Facsimile: (801) 618-3835

Barton H. Kunz II, Utah Bar No. 8827
bart.kunz@chrisjen.com
CHRISTENSEN & JENSEN, P.C.
Attorneys for Appellee Tooele County
15 West South Temple, Suite 800
Salt Lake City, Utah 84101
Telephone: (801) 323-5000
Facsimile: (801) 355-3472

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF JURISDICTION

The Utah Supreme Court had original jurisdiction over this appeal pursuant to Utah Code Annotated § 78A-3-102(3)(j), and has transferred it to this Court pursuant to Utah Rule of Appellate Procedure 42(a).

STATEMENT OF THE ISSUES

1. Whether the district court correctly held on summary judgment that the Government Records Access and Management Act does not require Tooele County to provide appellant Maese with an electronic copy of its property transaction database because a paper equivalent was available at the county recorder's office. (R. 380-82.)[1]

Standard of Review: Correctness. "'Because we resolve only legal issues in reviewing a summary judgment, we give no deference to the [district] court's view of the law; we review it for correctness.'" *Cabaness v. Thomas*, 2010 UT 23, ¶ 18, 232 P.3d 486 (quoting *Franco v. Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 32, 21 P.3d 198 (internal quotation marks omitted)) (alteration original). "'In reviewing a grant of summary judgment, we determine only whether the [district] court erred in applying the governing law and whether the [district] court correctly held that there were no disputed issues of material fact.'" *Id.* (quoting *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 400 (Utah 1998) (internal quotation marks omitted)) (alterations original).

2. Alternatively, whether this Court should affirm the district court's grant of summary judgment based on the undisputed material facts apparent in the record because appellant Maese's Government Records Access and Management Act request sought a

---

[1] An accurate copy of the district court's ruling is attached as an addendum, A1-A8.

computer program, proprietary software, and information available in a public library. (R. 139-41, 188-91, 264-68.)

Standard of Review: An appellate court may affirm a district court's judgment "'on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action,'" and even if it was not raised in or considered by the lower court. *Dipoma v. McPhie*, 2001 UT 61, ¶ 18, 29 P.3d 1225 (quoting *Limb v. Federated Milk Producers Ass'n*, 461 P.2d 290, 293 n. 2 (Utah 1969)) (internal quotation marks omitted). "To be 'apparent on the record,' '[t]he record must contain sufficient and uncontroverted evidence supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal.'" *Francis v. State*, 2010 UT 62, ¶ 10, 248 P.3d 44 (quoting *State v. Montoya*, 937 P.2d 145, 149-50 (Utah Ct. App. 1997)) (footnote omitted).

3. Alternatively, whether this Court should affirm the district court's grant of summary judgment based on the undisputed material facts apparent in the record because appellant Maese's Government Records Access and Management Act request would have required Tooele County to provide information that was already accessible in the identical physical form and content in a public publication or product. (R. 137-38, 186-87, 264.)

Standard of Review: Same as that for the second issue.

//

//

//

KEY CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Utah Code Annotated § 63G-2-103(22)(b)(v), (viii), (x) (2011):[2]

> (b) "Record" does not mean:
>
> * * *
>
> (v) proprietary software;
>
> * * *
>
> (viii) material that is cataloged, indexed, or inventoried and contained in the collections of a library open to the public, regardless of physical form or characteristics of the material; [or]
>
> * * *
>
> (x) a computer program that is developed or purchased by or for any governmental entity for its own use[.]

Utah Code Annotated § 63G-2-201(8)(a)(i)-(iii), (v) (2011):[3]

> (8)(a) In response to a request, a governmental entity is not required to:
>
> (i) create a record;
>
> (ii) compile, format, manipulate, package, summarize, or tailor information;
>
> (iii) provide a record in a particular format, medium, or program not currently maintained by the governmental entity;
>
> * * *
>
> (v) fill a person's records request if:
>
> (A) the record requested is accessible in the identical physical form and content in a public publication or product produced by the governmental entity receiving the request;
>
> (B) the governmental entity provides the person requesting the record with the public publication or product; and
>
> (C) the governmental entity specifies where the record can be found in the public publication or product.

//

---

[2] This section has been amended twice since Maese's July 2009 request, but neither amendment modified these provisions. Accordingly, the County refers to the current version in this brief.

[3] This section was amended in 2010, but the amendment did not affect these provisions. The County therefore refers to the current version in this brief.

Utah Code Annotated § 63G-2-201(12) (2009):[4]

> (12) A governmental entity may provide access to an electronic copy of a record in lieu of providing access to its paper equivalent.

STATEMENT OF THE CASE

Nature of the Case

Appellee Tooele County (the "County") has invested thousands of hours and hundreds of thousands of dollars developing an electronic database for its tax department and recorder's office. The database is known as the County Tax System, or CTS. The County created the CTS database using unique schema and database diagrams, as well as writing its own software routines. (R. 274-76, 320.) The data in the CTS database are compiled from information manually input from county tax rolls and property transaction

---

[4] This provision was materially amended in 2010, after Maese's request. The current version reads:

> (12) Subject to the requirements of Subsection (8), a governmental entity shall provide access to an electronic copy of a record in lieu of providing access to its paper equivalent if:
>
> (a) the person making the request requests or states a preference for an electronic copy;
>
> (b) the governmental entity currently maintains the record in an electronic format that is reproducible and may be provided without reformatting or conversion; and
>
> (c) the electronic copy of the record:
>
> (i) does not disclose other records that are exempt from disclosure; or
>
> (ii) may be segregated to protect private, protected, or controlled information from disclosure without the undue expenditure of public resources or funds.

Utah Code Ann. § 63G-2-201(12) (2011). The County therefore references the version in effect when Maese submitted his request in 2009. The district court also relied on the 2009 version. (Add. at A5.)

records filed or recorded with the County. (R. 275-76.) The County provides public access to the CTS database through paid subscription, which allows users to electronically browse information from the underlying records. Approximately twenty title companies have subscribed to the service. (R. 272-73.) The County also provides free public access to images of the property transaction records through its Search, Index, Retrieve, and Exchange (SIRE) program. (R. 272.)

In July 2009, appellant, S. Steven Maese, submitted to Tooele County a records request under the Government Records Access and Management Act (GRAMA) seeking: "The property transaction database, in the electronic format that Tooele County keeps it, in its entirety," or, alternatively, "a compiled transaction report, for the past 20 years, in electronic format." (R. 272.) The County refused to provide the database in electronic format because doing so would have required it to also provide the software program it created to make the database comprehensible. The County also explained that fulfilling the request would mean creating a record or compiling, formatting, manipulating, packaging, summarizing, or tailoring information, which GRAMA did not require. Further, the County told Maese that it did not maintain a compiled transaction report, but that the records were "available for inspection and copying, including scanned images." (R. 271-72.)

Maese appealed to the county commission, which also denied his request. The commission reiterated the County's prior reasoning and explained how Maese could inspect and obtain copies of the records he sought through the county recorder's office. (R. 269-71.) Maese then filed suit against the County in district court.

The Course of Proceedings

The County moved for summary judgment, arguing that the CTS database was not a record as defined by GRAMA, but rather a computer program and proprietary software, and that the database was material contained in the collection of a library open to the public. The County also asserted that, if the CTS database were a record as defined by GRAMA, it still would not need to satisfy Maese's request because doing so would require it to create a record or compile, format, manipulate, package, or tailor the information to separate the property transactions in the database from the tax information.[5] The County further asserted it was also excused from fulfilling the request because the CTS database and SIRE were public publications or products. (R. 122-47.) The County submitted a declaration from the director of the Tooele County Information Technology Department, Diane Burgener, in support of some of its arguments, and later submitted an amended version. (R. 148-52, 315-18, 322-30.) It also submitted a declaration of Michael Jensen, the Tooele County Auditor, testifying that the County had spent over $800,000 creating the CTS database. (R. 319-21.) Maese did not move to strike either version of Burgener's declaration or Jensen's declaration.

Maese opposed the County's motion, and submitted a declaration from his own witness, Stephen Coleman. (R. 176-97.) The County moved to strike Coleman's declaration on various evidentiary grounds. (R. 198-208.) Although Maese substantively opposed the County's summary judgment motion, his attorney also submitted a rule 56(f)

---

[5] The County withdrew an argument that the CTS database contained private and protected records. (R. 366-68.)

"affidavit,"[6] claiming to need discovery to determine "whether the County has developed an electronic database for use by the tax department and the county recorder's office known as the County Tax System, or CTS." Confusingly, Maese's attorney then proceeded to testify that

> [t]he data in the CTS database is compiled from information manually input from county tax rolls and property transaction records filed or recorded with the County. It has taken thousands of hours of continuing data entry by county employees to develop and maintain current information from those records in the CTS database.

(R. 184.) Maese's attorney also asserted discovery was needed regarding whether the database included protected and private information, and whether producing it in an electronic format would require the County to manipulate it to remove that information—issues mooted by the County's withdrawal of its argument that the CTS database contained such information. Maese also sought discovery on whether the CTS database integrated property transaction information with tax information, and whether producing just the property transaction information would require the County to "create a new database or compile, format, package, or tailor information from the CTS database." (R. 183-84.)

After requests to submit the County's motion for summary judgment and motion to strike Coleman's declaration had been filed, the County filed a notice of supplemental authority, attaching an order issued by Judge Rodney S. Page from the Utah Second District Court granting Davis County's motion to dismiss a suit filed by Maese upon that

---

[6] Although captioned as a "RULE 56(F) AFFIDAVIT," it was actually a declaration. (R. 183-85.)

county's refusal to satisfy a nearly identical GRAMA request. Maese moved to strike the supplemental authority. (R. 335-51.)

The Disposition Below

The district court issued a written ruling without taking oral argument. The court granted the County's motion to strike the Coleman declaration. It also granted the County's motion for summary judgment. (Add. at A1-A7.) The district court noted that GRAMA did not require the County to provide an electronic copy if the requested record's paper equivalent existed. (Add. at A5.) The court also found that it was undisputed that the County had directed Maese to equivalent paper records in the county recorder's office. (Add. at A5-A6.) The district court acknowledged Maese disputed some facts, but held that he "fail[ed] to establish how conducting discovery on these matters raises an issue of material fact." (Add. at A6.) The district court concluded that it was granting the motion "[b]ecause [Maese] concedes that [the County's] CTS record is a public record, and because pursuant to statute [the County] is not required to provide [Maese] with an electronic copy of its records as a paper equivalent is available at the County Recorder's Office, …." (Add. at A6 (citation omitted).) The court then found Maese's motion to strike the County's supplemental authority moot. (Add. at A7.)

Maese subsequently filed a notice of appeal. (R. 386-88.)

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

The CTS Database

1. Tooele County (the "County") has developed an electronic database for use by the tax department and the county recorder's office known as the County Tax System,

or CTS. The data in the CTS database are compiled from information manually input from county tax rolls and property transaction records filed or recorded with the County. It has taken thousands of hours of continuing data entry by county employees to develop and maintain current information from those records in the CTS database, and cost the County over $800,000 to create the database. (R. 275-76, 317, 320.)

2. The CTS database was built using a relational database management system (RDBMS) written in Structured Query Language (SQL), commercially available as Microsoft SQL Server. The County purchased an SQL server and twenty user licenses for approximately $16,915. (R. 275, 317, 322-23.)

3. While the RDBMS provided the tools for creating the CTS database, the County still needed to create schema and database diagrams in order to shape the RDBMS into the CTS database. The County also wrote the SQL-based routines necessary to build the CTS database itself. (R. 274-75.) Appellant S. Steven Maese conclusorily objected to these facts at the district court as immaterial and irrelevant (R. 274-75), but otherwise did not oppose them or move to strike Burgener's declaration.

4. According to declaration testimony Diane Burgener, Director of the Tooele County Information Technology Department, these unique schema, diagrams, and routines underlying the CTS database make it a computer program composed of proprietary software. (R. 274.) Maese disputed her testimony based on Stephen Coleman's declaration (R. 274), which the district court struck (Add. at A1-A4).

5. Burgener further testified that the CTS database was created and developed by the Tooele County Information Technology Department for the County's own use,

and that producing the CTS database in electronic format would disclose the program's schema, diagrams, and routines. (R. 273-74.)

6. The County provides public access to its electronic CTS database through paid subscription, which allows users to browse information from the underlying records. Approximately twenty title companies have subscribed to the service. (R. 272-73.) Maese conclusorily disputed these facts before the district court and objected to them as immaterial and irrelevant. (R. 272-73.)

7. The County also provides public access to images of the property transaction records from which it culls information for the CTS database through its Search, Index, Retrieve, and Exchange (SIRE) program, a free service. (R. 272.) Maese also conclusorily objected to these facts below as immaterial and irrelevant (R. 272), but otherwise did not oppose them or move to strike Burgener's declaration.

Maese's GRAMA Request

8. On or about July 13, 2009, Maese sent the County a request under the Government Records Access and Management Act (GRAMA) for:

- *The property transaction database, in the electronic format that Tooele County keeps it, in its entirety.*

Alternatively, Maese sought "a compiled transaction report, for the past 20 years, in electronic format." (R. 272.) Maese conclusorily objected to these facts below as immaterial and irrelevant. (R. 272.)

9. The County denied Maese's request, noting that, "[a]lthough it is possible to make an electronic copy of the property transaction database, this information is

unintelligible without the software program that the County created." (R. 271-72.) The County stated that the "software program is proprietary, and therefore, not a record which is subject to a GRAMA request ...." Moreover, the County explained, in order to make the database intelligible, it would "have to either 'create a record' or 'compile, format, manipulate, package, summarize, or tailor information,'" which it was not required to do. (R. 271-72.) Finally, the County notified Maese that it did not maintain a compiled transaction report, but that "[t]he County property records are available for inspection and copying, including scanned images." (R. 271.) Maese also conclusorily objected to these facts at the district court as immaterial and irrelevant. (R. 271-72.)

10. Maese appealed the denial to the county commission. (R. 270-71.) Maese likewise conclusorily objected to these facts below as immaterial and irrelevant. (R. 279-71.)

11. The commission denied Maese's request, reiterating the County's reasons. It also explained how Maese could inspect and copy the property transaction records:

> The records kept in the County Recorder's Office are readily available for inspection and copying, including the purchase of scanned images from 7:00 a.m. to 6:00 p.m. daily (M-F). These records are "open" to the public pursuant to Utah Code Title 17, and you have now again been instructed as to how you can access these records.

(R. 269-70.) Again, Maese conclusorily objected to these facts before the lower court as immaterial and irrelevant. (R. 270.)

SUMMARY OF ARGUMENT

Appellant Steven Maese filed a Government Records and Access Management Act (GRAMA) request for documents with appellee Tooele County (the "County") in

July 2009. It was no ordinary request—Maese sought the County's entire electronic property transaction database in its native format. The County informed Maese that the County's property transaction records were available for inspection and copying at the county recorder's office, and denied his request for the entire electronic database. The County's response to Maese's extreme request met GRAMA's requirements.

The County has spent more than $800,000 and invested thousands of hours to develop a database of tax and property records and information, known as the County Tax System (CTS) database. The County built the CTS database from a database management system it purchased, Microsoft SQL Server. It applied its own schema and diagrams to form the database's unique architecture and wrote routines in SQL language to create a database usable by both the County and private citizens. Like many counties in the state, Tooele County offers access to the CTS database by subscription, and several title companies subscribe to the service. In addition to this access, the County also provides paper property transaction records for inspection and copying at the county recorder's office and free use of the County's Search, Index, Retrieve, and Exchange (SIRE) program, which provides electronic images of property transaction records. Thus, the County provides multiple avenues for the public to access property transaction records.

Disregarding these means to obtain copies of the property transaction records, Maese sought the entire CTS database. The district court correctly held GRAMA did not require the County to provide Maese the electronic database when the paper equivalent was available. Moreover, the uncontroverted facts apparent on the record show the CTS

database is a computer program, proprietary software, and is contained in a public library, which exclude it from GRAMA's definition of a record. Even if the CTS database were a record as defined by GRAMA and a paper equivalent was unavailable, the County still would not have been required to produce the database because it was accessible in a public publication.

Among other purposes, GRAMA was intended to "establish fair and reasonable records management practices." Utah Code Ann. § 63G-2-102(3)(f) (2011). It is neither fair nor reasonable to allow someone to obtain through a simple GRAMA request a proprietary computer database a government has spent hundreds of thousands of taxpayer dollars to create, especially when the information it contains is already available to the public. If Maese's request were permitted, it would set an expensive precedent for similar databases used by other governmental entities in the state.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE COUNTY WAS NOT REQUIRED TO PROVIDE MAESE WITH THE ENTIRE CTS DATABASE IN NATIVE ELECTRONIC FORMAT BECAUSE A PAPER EQUIVALENT WAS AVAILABLE.

Under the version of GRAMA applicable to Maese's 2009 request, the County was not required to fulfill a requester's preference for producing records in an electronic format if a paper equivalent was available. The County's property transaction records are available for inspection and copying in paper form through the county recorder's office, and are available in electronic formats through the County's CTS database and SIRE program that can be downloaded and saved or printed. Under these circumstances, the

County did not violate GRAMA when it declined to provide Maese a copy of its entire electronic database of property transaction records in native format, and instead referred him to the county recorder's office to inspect and copy whatever property transaction records he wanted.

While GRAMA now requires, subject to various limitations, a governmental entity to provide access to an electronic record in lieu of its paper equivalent when requested, *see* Utah Code Ann. § 63G-2-201(12) (2011), the version that applied when Maese made his request in 2009 contained no such requirement.[7] *See* 2010 Utah Laws 2595-98 (amending the subsection to its current form). Utah Code Annotated § 63G-2-201(12) (2009) provided that "[a] governmental entity may provide access to an electronic copy of a record in lieu of providing access to its paper equivalent." Thus, the 2009 version of GRAMA left it to a governmental entity's discretion whether to provide access to an electronic version of a record if a paper equivalent was available.

As the district court found, the County "directed [Maese] to the equivalent paper records available at the County Recorder's Office." (Add. at A5.) Maese had access to the paper property transaction records for inspection and copying, and the County was not obligated to satisfy his demand to provide them in electronic format.

---

[7] The 2009 version controls the issues presented here. *See, e.g., State v. Clark*, 2011 UT 23, ¶ 13, 681 Utah Adv. Rep. 13 ("[W]e apply the law as it exists at the time of the event regulated by the law in question."); *Harvey v. Cedar Hills City*, 2010 UT 12, ¶ 12, 227 P.3d 256 ("As a general rule, when adjudicating a dispute we apply the version of the statute that was in effect 'at the time of the events giving rise to [the] suit.'" (quoting *Taghipour v. Jerez*, 2002 UT 74, ¶ 5 n. 1, 52 P.3d 1252) (footnote omitted) (alteration original)).

Maese lacks support for his argument that giving him access to the documents from which the CTS database is built, whether in paper format or through electronic images in the SIRE program, or even access to the CTS database itself, does not fulfill his request because it is not a copy of the County's entire "property transaction database." (R. 272.) There is no evidence in the record that, if Maese wanted, he could not get a paper, or even an electronic, copy of every single property transaction document in the CTS database through the county recorder's office, the CTS database, or the SIRE program, nor does he allege as much. Consequently, Maese's request is, at its core, a request for records in a preferred format (electronic), which the County was not required to meet.

GRAMA subsection -201(1)'s identification of "the right to take a copy of a public record," Utah Code Ann. § 63G-2-201(1) (2011)[8], contrary to Maese's interpretation (Aplt's Br. at 13), does not contradict this reasoning. Whether in paper or electronic form, the County's denial did not interfere with his right to take a copy of every property transaction record in the CTS database. Maese's reliance on GRAMA subsection -201(11)'s prohibition against governments using "the physical form, electronic or otherwise, in which a record is stored to deny, or unreasonably hinder the rights of a person to inspect and receive a copy of a record under this chapter," Utah Code Ann. § 63G-2-201(11) (2011)[9], (Aplt's Br. at 13-14) likewise lacks substantive import in this context. The County did not deny or hinder Maese's right to obtain a copy

[8] This subsection remains unchanged from the 2009 version.

[9] This subsection also remains unchanged from the 2009 version.

of the documents in the CTS database. It simply directed him to the location where the information he sought was already publicly available, in both electronic and paper form.

Maese's argument that the County violated GRAMA by providing access to the CTS database instead of an electronic copy of the entire database in native format (Aplt's Br. at 13) relies on his claim, made in his argument summary but nowhere else in his brief, that the database "contains metadata and other variables not available online or through paper copies" (Aplt's Br. at 7). Maese points to no admissible evidence supporting that assertion, nor is the County aware of any such evidence in the record. Maese's attorney's rule 56(f) declaration sought no discovery on this topic. (R. 182-85.) Thus, Maese's argument that the CTS database contains metadata and vaguely described "other variables" (Aplt's Br. at 7) that would not be present in the paper records or the images and information downloadable from the CTS database or the SIRE program lacks any record support and should be disregarded. Even had Maese adequately supported his claim that the CTS database contained information available only in electronic form, that information would not be a record as defined in GRAMA, or, if it was a record, GRAMA would not have required the County to produce it. *See infra*, Parts II & III.

II. ADDITIONALLY, THE COUNTY WAS NOT REQUIRED TO FULFILL MAESE'S REQUEST FOR THE ENTIRE CTS DATABASE IN ITS NATIVE ELECTRONIC FORMAT BECAUSE IT IS NOT A RECORD AS DEFINED BY GRAMA.

In addition to the existence of a paper equivalent, the County validly denied Maese's GRAMA request because what he sought is not defined as a record under GRAMA. While GRAMA establishes the right to inspect and take copies of public

records, *see* Utah Code Ann. § 63G-2-201(1) (2011), the act also excludes computer programs, proprietary software, and information collected in a public library from the definition of a record, *see* Utah Code Ann. § 64G-2-103(22)(b)(v), (vii) & (x) (2011). Because the CTS database falls within each these exclusions, the Court may also affirm the district court's summary judgment on this alternative ground. The County addresses each exception below.

(a) The CTS database is not a record as defined by GRAMA because it is a computer program developed and purchased by the County for its own use.

Under GRAMA, "'[r]ecord' does not mean a computer program that is developed or purchased by or for any governmental entity for its own use." Utah Code Ann. § 63G-2-103(22)(b)(x) (2011) (formatting and enumeration omitted). The CTS database meets this exclusion's material elements.

The CTS database is a computer program. GRAMA does not define the term computer program, but it is defined in a generally accepted dictionary as "a sequence of instructions that a computer can interpret and execute." (Dictionary.com, WordNet® 3.0, Princeton Univ.; http://dictionary.reference.com/browse/computer program (last visited June 08, 2011).) *See Hercules Inc. v. Utah State Tax Comm'n*, 2000 UT App 372, ¶ 9, 21 P.3d 231 ("'When a statute fails to define a word, we rely on the dictionary to divine the usual meaning.'" (quoting *State v. Redd*, 954 P.2d 230, 234 (Utah Ct. App. 1998)) (quotation and citation omitted).) Maese does not dispute that the County built the CTS

database using Microsoft SQL Server. (R. 275.) Similar to a kit[10], the server provided the County the components to build the database created from the County's own architecture, and derived from its own schema and diagrams. The County wrote its own routines in SQL computer language to create the database. (R. 274-75.) (A routine is "[a] section of a program that performs a particular task." (Webopedia, internet.com; http://www.webopedia.com/TERM/R/routine.html (last visited June 8, 2011)).)[11] Thus, the CTS database consists of information and sequential instructions for the computer to interpret and execute, i.e., a computer program. While Maese argues the CTS database is not proprietary software, he at least acknowledges Microsoft SQL Server is a computer program. (Aplt's Br. at 11 ("Microsoft's SQL Server is a computer program—although not proprietary—and the Database is simply a product of that program."))

Maese does not dispute that the County purchased Microsoft SQL Server, nor does he substantively dispute that the County applied its own schema and diagrams to it and wrote its own SQL routines. He also does not substantively dispute that the County used the Microsoft SQL Server to build the CTS database, or that the County did so for its own

---

[10] Maese's comparison of Microsoft SQL Server to Microsoft Word (Aplt's Br. at 11) is inapt. The server acts as a kit from which the owner builds an SQL-based program using its own schema and diagrams and writes its own routines, whereas Word is already a finished product ready to be put to its end use.

[11] Because this term is technical, the County cites a technical source for its definition. *Cf. Wasatch County v. Okelberry*, 2008 UT 10, ¶ 13, 179 P.3d 768 (explaining that the court looks to the commonly understood meaning of words unless they have a "well-established technical meaning"). Webopedia is "a free online dictionary for words, phrases and abbreviations that are related to computer and Internet technology." (Webopedia, internet.com; http://www.webopedia.com/AboutUs.asp (last visited June 9, 2011)).

use. Nor does he dispute that the County provides public access to the database through paid subscription. Consequently, the CTS database falls within GRAMA's computer program exclusion. It is a computer program the County purchased and developed for its own use.

In his response to the County's statement of facts supporting its motion for summary judgment, Maese asserted the CTS database was not a computer program. (R. 274.) But his assertion was based upon a declaration the district court later struck.[12] The district court struck Stephen Coleman's declaration upon finding it "provide[d] largely conclusory statements" and failed to provide appropriate foundation for the expert opinion it offered. (Add. at A2-A3.) In his brief, Maese does not directly challenge the district court's grounds for striking Coleman's declaration.[13] Rather, he argues that, since he disputed the County's factual allegations with references to Coleman's declaration, the district court should have accepted his allegations as true and denied the County's motion. (Aplt's Br. at 8-9.) This assertion misapplies rule 56.

//

---

[12] Neither party contends a declaration under Utah Code Annotated § 78B-5-705 does not qualify as an "affidavit" under rule 56(e).

[13] At best, Maese inadequately briefed the point. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 313 (Utah 1998) (holding a brief lacking references to legal authority and citations to the record was inadequately briefed). If he had challenged the district court's ruling, he would have faced a heavy burden. Such decisions are upheld unless they result from an abuse of discretion. *See Golden Meadows Properties, LC v. Strand*, 2010 UT App 257, ¶ 13, 241 P.3d 375, *cert. denied,* 247 P.3d 774 (Utah 2011) ("'A district court's refusal to consider evidence or to exclude evidence is reviewed under an abuse of discretion standard.'" (quoting *Cabaness v. Thomas*, 2010 UT 23, ¶ 31, 232 P.3d 486)).

An affidavit cannot defeat a motion for summary judgment if it is inadmissible. Under rule 56(e), affidavits supporting and opposing a motion for summary judgment must "be made on personal knowledge, [must] set forth such facts as would be admissible in evidence, and [must] show affirmatively that the affiant is competent to testify to the matters stated therein." UtahR.Civ.P. 56(e). An affidavit that does not meet this standard is ineffective. *See Rainford v. Rytting*, 451 P.2d 769, 771 (Utah 1969) ("An affidavit in opposition to a motion for summary judgment to be effective must set forth such facts as would be admissible in evidence."). Consequently, because the district court found Coleman's declaration inadmissible and struck it, it was ineffective to raise a material issue of fact.

Maese's argument that his attorney's rule 56(f) affidavit should have prevented the district court's summary judgment similarly fails. Maese contends the district court "failed to consider" his "request for discovery to continue so he could discover additional facts to refute Tooele's allegations." (Aplt's Br. at 8.) However, the district court did address his request, holding that Maese "fail[ed] to establish how conducting discovery on these matters raise[d] an issue of material fact."[14] (Add. at A6.) Maese fails anew on appeal.

---

[14] Like Maese's response to the district court's striking of Coleman's declaration, he does not directly challenge the district court's finding regarding his attorney's rule 56(f) affidavit. Also similar to that ruling, Maese would face a steep challenge to overturn the district court's denial of his request for discovery if he tried, since it is reviewed for an abuse of discretion. *See Aspenwood, L.L.C. v. C.A.T., L.L.C.*, 2003 UT App 28, ¶ 16, 73 P.3d 947 (applying abuse of discretion standard).

The only issue on which Maese's attorney arguably sought discovery that related to whether the CTS database was a computer program was to determine "whether the County ha[d] developed an electronic database for use by the tax department and the county recorder's office known as the County Tax System, or CTS." (R. 184.) But Maese repeatedly concedes in his brief that the CTS database exists and contains property transaction records. (Aplt's Br. at 6 ("Maese unequivocally advanced a singular argument at the trial court: The County's CTS Database is a public record; ...."); 9 ("The County's CTS Database is record [sic]."); 10 ("[W]ithout question and evidenced by its Statement of Undisputed Facts, the County prepared, owns, and retains the Database." (footnote omitted)); 11 ("The County built the Database with Microsoft SQL Server."); 12 ("Under the County's assertions and agreed by all, the Database is comprised of property transaction [sic] which statutorily are public." (footnote omitted)); 13 ("The County asserts, and Maese agrees, that it provides access to individual records within the Property Transaction Database at its offices during normal business hours.").) These admissions obviated any alleged need for additional discovery on this point.

The rule 56(f) affidavit submitted by Maese's attorney was also deficient. A rule 56(f) affidavit should "provide the court with specifics of what further discovery [is] needed, what facts [the party seeking discovery] believe[s] would be uncovered, and how those facts [are] relevant to the summary judgment issues before the court." *Aspenwood, L.L.C. v. C.A.T., L.L.C.*, 2003 UT App 28, ¶ 21, 73 P.3d 947. Although Maese's attorney's rule 56(f) affidavit identifies discovery she believes she needs about whether the County developed the CTS database for use by the tax department and the county

recorder's office, it does not specify the facts she believes discovery on that topic will uncover, and how those discovered facts would be relevant to the County's summary judgment motion. (R. 182-85.) Thus, Maese cannot escape the conclusion that the CTS database is a computer program by relying on his attorney's rule 56(f) affidavit.

The foregoing analysis demonstrates that there are sufficient uncontroverted facts apparent on the record to affirm the district court's grant of summary judgment on the ground that the County's CTS database is not a record as defined by GRAMA because it is a computer program the County developed or purchased for its own use.

(b) The CTS database is not a record as defined by GRAMA because it is proprietary software.

As described above, the County developed the CTS database from Microsoft SQL Server, applying its own diagrams and schema and writing its own routines in SQL language. The finished product, the CTS database, is therefore proprietary software, which GRAMA excludes from its definition of a record. Maese's reliance on Coleman's stricken declaration does not avoid this classification.

In addition to computer programs, GRAMA excludes "proprietary software" from its definition of a record. Utah Code Ann. § 63G-2-103(22)(b)(v) (2011). The County's CTS database falls within this exclusion.

A database is "[a] collection of information organized in such a way that a computer program can quickly select desired pieces of data." (Webopedia, internet.com; http://www.webopedia.com/TERM/D/database.html (last visited June 9, 2011).) The organization of information within a computer database is highly developed. *See Positive*

Software Solutions, Inc. v. New Century Mortgage Corp., 259 F.Supp.2d 531, 533 n. 1 (N.D. Tex. 2003) ("A database is not simply a shoe box into which all the information is thrown. It is, rather, a very structured hierarchy of information."). "To access information from a database, you need a database management system (DBMS). This is a collection of programs that enables you to enter, organize, and select data in a database." (Webopedia, internet.com; http://www.webopedia.com/TERM/D/database.html (last visited June 9, 2011)) and "to store, modify and extract information from a database." (Webopedia, internet.com; http://www.webopedia.com/TERM/D/database_management_system_DBMS.html (last visited June 9, 2011)). Requests through a DBMS to perform these tasks are made via queries. "The set of rules for constructing queries is known as a query language. Different DBMSs support different query languages, although there is a semi-standardized query language called SQL (structured query language)." (*Id.*) Here, the County used Microsoft SQL Server, a relational DBMS written in SQL. Thus, the CTS database must include the relational DBMS and SQL queries to be useable. They are inseparable for the purposes of Maese's GRAMA request. The County informed Maese of this, noting that the database was unintelligible without its proprietary software program. (R. 271-72.)

A database, with its DBMS and SQL routines or queries, is software, which is defined as "[c]omputer instructions or data. Anything that can be stored electronically is software." (Webopedia, internet.com;

//

//

http://www.webopedia.com/TERM/S/software.html (last visited June 9, 2011).)[15] The CTS database is, therefore, software. It is also proprietary. The County developed the CTS database using a relational DBMS (i.e., Microsoft SQL Server) based on the County's unique schema and diagrams and writing its own SQL routines. These acts transformed what amounts to a kit into a unique, proprietary database. SQL databases are routinely copyrighted as proprietary computer programs. (R. 220-26.) *See also Positive Software Solutions*, 259 F.Supp.2d at 535 (finding "the SQL Data Structures here are a set of statements to be used indirectly in a computer in order to bring about a certain result" and were therefore copyrightable). These uncontroverted facts apparent on the record are sufficient to hold that the CTS database is proprietary software, and that it is excluded from GRAMA's definition of a record.

For reasons already explained, Maese's reliance on Coleman's stricken declaration to dispute these definitions is unfounded. *See supra*, Part II(a).

(c) The CTS database is not a record as defined by GRAMA because it is material contained in a public library.

As a library of property transaction records open to the public, the CTS database is excluded from GRAMA's definition of a record. Maese's complaint that the County provides access to the CTS database by paid subscription does not mean access is not public.

---

[15] The same conclusion results from Maese's definition of software as "'the programs used to direct the operation of a computer, ...'" (Aplt's Br. at 11 (quoting Dictionary.com Unabridged, Random House, Inc.; http://dictionary.reference.com/browse/software (last accessed Oct. 2, 2009)).) The CTS database, including the relational DBMS and SQL routines, direct a computer's operation when someone searches the database.

In addition to computer programs and proprietary software, GRAMA also excludes from its definition of a record "material that is cataloged, indexed, or inventoried and contained in the collections of a library open to the public, regardless of physical form or characteristics of the material." Utah Code Ann. § 63G-2-103(22)(b)(viii) (2011) (formatting and enumeration omitted). The CTS database includes a collection of the property transaction records in the County, i.e., it is a library of those records. (*Dictionary.com Unabridged*, Random House, Inc.; http://dictionary.reference.com/browse/library (last visited June 09, 2011) (defining a library, *inter alia*, as "a collection of manuscripts, publications, and other materials for reading, viewing, listening, study, or reference").) Because the County provides public access to the CTS database by paid subscription, the database falls within GRAMA's exception for material contained in the collection of a library open to the public. These uncontroverted facts apparent on the record are sufficient to affirm the district court's grant of summary judgment.

Maese argues that, because he claims the CT database itself is a public record, this exclusion does not apply unless the database is contained in a public library. (Aplt's Br. at 12.) This argument ignores the fact that the database is the library, and its contents are already open to the public. Maese is essentially requesting a copy of a public library, and GRAMA protects governments against such unnecessary and burdensome requests. To the extent Maese asserts the database itself contains "metadata and other variables" (Aplt's Br. at 7), he provides no evidence to support that assertion. *See supra*, Part I. Maese also provides no legal support for his argument that the County's paid subscription

service to the CTS database does not qualify as a library open to the public. (Aplt's Br. at 12.) GRAMA itself contradicts this idea by allowing governments to charge fees for providing requested records. *See* Utah Code Ann. § 63G-2-203 (2011).

III. EVEN IF THE CTS DATABASE WERE A RECORD AS DEFINED BY GRAMA, THE COUNTY WAS NOT REQUIRED TO PRODUCE IT BECAUSE IT WAS PUBLICLY ACCESSIBLE.

Similar to the public library exclusion, GRAMA exempts governments from producing records that are accessible through a public publication or product provided by the government. Here, the CTS database and the SIRE program fall within that exemption.

Under GRAMA, a governmental entity is not required to fill a records request if it provides public access to the record in identical physical form and content, provides that access to the requester, and specifies where the record can be found:

> (8)(a) In response to a request, a governmental entity is not required to:
>
> * * *
>
> (v) fill a person's records request if:
>
> (A) the record requested is accessible in the identical physical form and content in a public publication or product produced by the governmental entity receiving the request;
>
> (B) the governmental entity provides the person requesting the record with the public publication or product; and
>
> (C) the governmental entity specifies where the record can be found in the public publication or product.

Utah Code Ann. § 63G-2-201(8)(a)(v) (2011). The County provides direct access to the CTS database Maese seeks through paid subscription. It also provides electronic images of property transaction records for free through its SIRE program. In response to Maese's request, the County informed him the records were available through the county

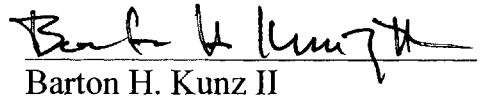
recorder's office and provided the office hours. These facts are undisputed and apparent on the record, and represent yet another basis upon which the Court may affirm.

CONCLUSION

For the foregoing reasons, the County requests the Court affirm the district court's summary judgment, holding that it correctly found that the County was not required to provide its CTS database in its native electronic format because a paper equivalent was available. The County requests the Court also or alternatively hold that, based on the uncontroverted evidence apparent in the record, the CTS database is not defined as a record under GRAMA because it is instead a computer program, proprietary software, and is collected in a public library. Finally, the County asks the Court to additionally or alternatively hold, based on the undisputed evidence apparent on the record, that, if GRAMA classifies the CTS database as a record, the County was not required to produce it because Maese could have accessed it through the county recorder's office. These alternative grounds for affirming summary judgment apply even under the amendments passed since Maese submitted his request in July 2009.

DATED this 10th day of June, 2011.

CHRISTENSEN & JENSEN, P.C.



Barton H. Kunz II
Attorneys for Respondent and Appellee Tooele County

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of June, 2011, two true and correct copies of the foregoing "BRIEF OF APPELLEE TOOELE COUNTY" were served on the following in the manner indicated:

Kelly Ann Booth kellyann@boothlegal.com LAW OFFICES OF KELLY ANN BOOTH, PLLC **Attorneys for Appellant Maese** The Judge Building 8 East Broadway, Suite 700 Salt Lake City, Utah 84111 Facsimile: (801) 618-3835	_____ hand delivery _____ overnight mail __X__ first class, postage prepaid U.S. mail _____ email _____ facsimile

CHRISTENSEN & JENSEN, P.C.

Barton H. Kunz II
Attorneys for Respondent and Appellee Tooele County

ADDENDUM

IN THE THIRD JUDICIAL DISTRICT, TOOELE COUNTY
STATE OF UTAH

S. STEVEN MAESE, Petitioner, vs. TOOELE COUNTY, Respondent.	**RULING** Case No.: 090301452 Judge: Stephen L. Henriod

The above entitled matter is before the Court on Respondent's Request to Submit for Decision its Motion to Strike Coleman Declaration and Motion for Summary Judgment, filed February 2, 2010, and, Petitioner's Request to Submit for Decision his Motion to Strike Notice of Supplemental Authority, filed February 19, 2010. Having reviewed the motions and relevant oppositions thereto, and being duly advised in the premises of each, the Court makes the following Ruling.

Respondent's Motion to Strike

Respondent requests the Court to Strike the Declaration of Stephen Coleman, filed as an exhibit with Petitioner's Opposition to Respondent's Motion for Summary Judgment, (Pet'r's Opp. Ex. B), because it fails to provide any foundation for the statements

asserted therein. (Resp't's Mem. In Supp. 2-4).

Utah Rules of Civil Procedure, Rule 56(e) provides in relevant part, "Supporting and opposing affidavits shall be made on personal knowledge, *shall set forth such facts* as would be *admissible in evidence*, and *shall show affirmatively* that the affiant is competent to testify to the matters stated therein." (2009)(emphasis added).

Coleman's Declaration provides largely conclusory statements. For example, Coleman states:

> 8. SQL databases are files, independent of any software, which contain electronic data.
> 9. SQL databases can be copied.
> 10. An SQL databases, schema, routines, and diagrams may be unique, but do not constitute proprietary software.

(Pet'r's Opp. Ex. B) Coleman does not provide any basis for these conclusory statements. See Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985) (explaining that affidavits which reveal no evidentiary facts, but merely reflect the affiant's unsubstantiated opinions and conclusions are deficient and will be disregarded).

Moreover, while an affiant is not required to be expert to speak to a particular matter, in State v. Rothlisberger, 2006 UT 49, 147 P.3d 1176, the court held that the statements of a police chief were considered expert testimony because it was based on

specialized knowledge that an average bystander would be unable to provide. Specifically, the court explained:

> [T]he test for determining whether testimony must be provided by an expert is whether the testimony requires that the witness have scientific, technical, or other specialized knowledge; in other words, whether an average bystander would be able to provide the same testimony. We recognize that the advisory committee's note to federal rule 701 incorporates the distinction between expert and lay testimony set forth in State v. Brown that "lay testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'" This "process of reasoning" language is unhelpful, however, because even highly technical or scientific testimony may be based on simple inductive or deductive reasoning that the average person uses every day. Thus, *the real distinction must be based on the level of knowledge that witnesses have from which they can draw their conclusions. If that knowledge is not within the ken of the average bystander, then it is properly characterized as specialized knowledge.*

Id. at ¶22 (citations omitted). Because it is reasonable to consider that the concepts related to SQL require a specialized understanding, e.g., schemas, routines, diagrams, are not within the ken of the average bystander, an expert must lay the appropriate foundation of its expertise in relation to SQL, but also provide a sufficient basis as to how that relates to Respondent.

Coleman's affidavit fails to provide this foundation. See State v. Locke, 688 P.2d 464 (Utah 1984)(explaining that the

matter of qualification of an expert witness lies wihtin the discretion of the court); Schindler v. Schindler, 776 P.2d 84, 89 (Utah Ct. App. 1989)(explaining that the trial court has discretion to determine the qualifications of an expert witness to give an opinion on a particular matter and the admissibility of the expert's testimony).

Based upon the foregoing, the Court GRANTS Respondent's Motion to STRIKE.

Respondent's Motion for Summary Judgment

Respondent also seeks summary judgment against Petitioner in part, on the basis that the Government Access Records Management Act ("GRAMA") does not require it to create a new tailored database for Petitioner. Utah Code Ann. §63G-2-201(8)(a) (2009).

The relevant portion of 63G-2-201 provides:

> (7) A governmental entity *shall provide* a person with a certified copy of a record *if*:
>
> (a) the person requesting the record has a right to inspect it;
>
> (b) the person identifies the record *with reasonable specificity*; and
>
> (c) the person pays the lawful fees.
>
> (8) (a) In response to a request, a governmental entity is *not required to*:
>
> (i) create a record;
>
> (ii) compile, format, manipulate, package, summarize, or tailor information;
>
> (iii) provide a record in a particular format, medium, or program not currently maintained by the governmental entity;
>
> (iv) fulfill a person's records request if

the request unreasonably duplicates prior records requests from that person; or

(v) fill a person's records request *if*:

(A) the record requested is accessible in the identical physical form and content in a public publication or product produced by the governmental entity receiving the request;

(B) the governmental entity provides the person requesting the record with the public publication or product; and

(C) the governmental entity specifies where the record can be found in the public publication or product.

(b) Upon request, a governmental entity *may provide a record in a particular form* under Subsection (8)(a)(ii) or (iii) if:

(i) the governmental entity determines it is able to do so without unreasonably interfering with the governmental entity's duties and responsibilities; and

(ii) the requester agrees to pay the governmental entity for providing the record in the requested form in accordance with Section 63G-2-203. . . .

(12) A governmental entity *may provide* access to an electronic copy of a record *in lieu* of providing access to its paper equivalent.

(emphasis and extra emphasis added).

The unambiguous language of the statute provides that Respondent is not required to create a special record for Petitioner or, provide Petitioner with an electronic copy of its records if there is a paper equivalent. Id. at Section 63G-2-201(12). Respondent, in its correspondence, has directed Petitioner to the equivalent paper records available at the County Recorder's Office. (Resp't's Mem. In Supp. Exs. 3, 5).

Petitioner does not dispute this fact.

Moreover, Respondent is not required to provide Petitioner an electronic copy of its records if it unreasonably interferes with the its duties and responsibilities. See Section 63G-2-201(8)(b); see also(Resp't's Mem. In Supp. at iii, nos. 2-3). Although Petitioner disputes the noted statements of fact, it fails to establish how conducting discovery on these matters raises an issue of material fact. See Sanns v. Butterfield Ford, 2004 UT App 203, ¶6, 94 P.3d 301 ("A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ on whether defendant's conduct measures up to the required standard." (citation omitted)); Burns v. Cannondale Bicycle Co., 876 P.2d 415, 419 (Utah Ct. App. 1994) (explaining that existence of genuine issues of fact does not preclude the entry of summary judgment if those issues are immaterial to resolution of the case).

Because Petitioner concedes that Respondent's CTS record is a public record, (Pet'r's Opp. 9), and because pursuant to statute Respondent is not required to provide Petitioner with an electronic copy of its records as a paper equivalent is available at the County Recorder's Office, Respondent's Motion for Summary Judgment is GRANTED.

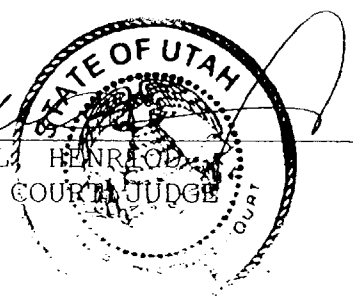
Petitioner's Motion to Strike

Because the Court Grants Respondent's Motion for Summary Judgment, Respondent's Motion to Strike is MOOT.

This RULING stands as the Order of the Court. No further order is required.

Dated this 29 day of March 2010.

BY THE COURT:



STEPHEN L. HENRIOD
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling dated this 29 day of March 2010, postage prepaid, to the following:

Barton H. Kunz, II
Christensen & Jensen, PC
15 West South Temple, Suite 800
Salt Lake city, UT 84101

Kelly Ann Booth
Law Offices of Kelly Ann Booth, PLLC
299 South Main Street, 13th Floor
Salt Lake City, UT 84111

Nancy Watkins
CLERK OF COURT